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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 26, 1998

97-57

Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 97-234
Implementation of Section 309(j) of the Communications Act

Dear Ms. Salas:

Transmitted herewith, on behalf of Orion Communications Limited is an original and four (4) copies of its Comments in the above-referenced Federal Communications Commission Notice of Proposed Rule Making, FCC 97-397, released November 26, 1997.

Please contact the undersigned should the Commission have any questions with respect to these Comments.

Sincerely,

Lee J. Peltzman
Counsel for
ORION COMMUNICATIONS
LIMITED

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	**MM Docket No. 97-234**
of the Communications Act – Competitive	)	
Bidding for Commercial Broadcast and	)	
Instructional Television Fixed Service Licenses	)	
	)	
Reexamination of the Policy	)	**GC Docket No. 92-52**
Statement on Comparative	)	
Broadcast Hearings	)	
	)	
Proposals to Reform the Commission's	)	**GEN Docket No. 90-264**
Comparative Hearing Process to	)	
Expedite the Resolution of Cases	)	

To: The Commission

COMMENTS

Orion Communications Limited ("Orion"), by counsel, submits its Comments to the Notice of Proposed Rule Making ("NPRM"), FCC 97-397, released November 26, 1997, considering, in part, whether the Commission should use competitive bidding procedures or employ a comparative hearing process for mutually exclusive applications pending as of June 30, 1997. In support of its position, Orion submits the following:

The Commission tentatively concluded in its NPRM that auctions would likely lead to a speedier resolution of pending cases. The Commission suggested that potential delay, administrative costs and uncertainty might be associated with broadcast comparative hearings.[1] However, Orion believes that these concerns are somewhat overstated. More importantly, they are demonstrably outweighed by equitable considerations, which Orion addresses below. Indeed,

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[1] NPRM at 9.

as applied to Orion's particular case, an auction method would almost assuredly engender the very delays, costs and uncertainties that the Commission seeks to avoid.

Background

First and foremost, approximately twenty (20) cases were mishandled by the Commission's uneven administration of its hearing processes and subsequent inordinate lethargy in issuing comparative hearing rules. But for the Commission's willingness to tolerate repetitious appeals, as the U.S. Court of Appeals for the D.C. Circuit recently observed, Orion (and its cohorts' cases) likely would have been resolved long ago.[2] We briefly turn to the specifics.

Orion is the successful appellant in an action that reversed the FCC's decision in one of the pending proceedings affected by new Section 309(l) of the Communications Act. The Court issued a unanimous decision on December 19, 1997, reversing and remanding the FCC order. The FCC's order had rescinded Orion's interim authority to operate an FM station at Biltmore Forest, North Carolina, and granted that authority to a temporary consortium of competitors, whose applications the Commission had previously rejected. In its decision, the Court found the Commission's action to have (1) been based on erroneous conclusions concerning Orion's reliance on FCC actions; (2) created an unfounded exception to a general rule issued in a previous FCC Public Notice; (3) failed to follow standards articulated in previous FCC policies; and (4) departed from the Commission's own recent precedent without providing a reasoned explanation for so doing.[3] Court found that, but for the FCC's willingness to tolerate a pattern of

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[2] See Orion Communications Limited v. FCC, No. 96-1430 (D.C. Cir., decided December 19, 1997 (slip op. at 9).

[3] Id. at 4-5.

repetitive and discredited motions for reargument, Orion quite probably would have received permanent licensure years ago.[4] As relief, the Court ordered the FCC "to reinstate Orion forthwith as the interim licensee" pending such further action as the Commission might take with respect to the underlying permanent license.[5]

Given the foregoing, equitable considerations are attendant to Orion's case as well as others frozen in the so-called Bechtel time warp.[6] These issues must be addressed in any rule-making dealing with the question of whether to use an auction mechanism to award permanent broadcast licenses. We will look at Orion's case alone for the moment. The Lee Family, which owns and controls Orion, has provided over a century of combined broadcast service to Asheville, North Carolina. The Family has broadcast in that market since the late 1940's, first on an AM frequency and later on the FM facility in dispute. Prior to Orion's illegal ouster, it had gone from a zero market share to the third-ranked station in the Asheville market. Strict adherence to an auction mechanism would ignore the Lee Family's (and their cohorts') adherence to the Commission's rules and policies and the Lee Family's half-century-long service to their public. The Lee Family has played by the rules set by the Commission, first in providing service to their listeners and thereafter in making application, then prosecuting that application for a decade before the FCC pursuant to those standards set by the Commission, and finally in being unjustifiably thwarted by the FCC's tolerating abusive litigation tactics: but for the "repetitious" appeals filed by competing applicants, "Orion's license would probably have

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[4] Id. at 9.
[5] Id. at 12.
[6] See Bechtel v. FCC, 10 F.3d 875 (D.C.Cir. 1993).

become final long before [the Court's] decision in Bechtel unsettled the matter."[7]

Exercise of Discretion

The Commission has concluded, and Orion agrees, that the FCC has discretion to use comparative proceedings to resolve the entire class or a subset of those cases pending on June 30, 1997. Orion can understand why, on a practical and on an administrative basis, the Commission might view the "vast majority" of pre-July 1, 1997 applicants as having been filed without reliance on any selection criteria, inasmuch as the Commission froze all such cases after the Bechtel decision.[8]

But that does not address the comparatively small class of approximately twenty (20) pre-July 1, 1997 cases - - such as Orion's - - which (a) were filed before Bechtel; (b) were fully litigated before an FCC presiding judge under the old rules (i.e. with at least an initial decision issued); and (c) which became enmeshed in a post-Bechtel bureaucratic limbo with no final action taken since then. The Commission can take notice that those proceedings have become extremely frustrating, expensive and time-consuming, far beyond the normal delays and costs of litigation. In Orion's case, the underlying proceedings began in 1987. Orion has spent well over Three Hundred Thousand Dollars ($300,000.00) to litigate before the FCC alone. Moreover, Orion's experience is not inconsistent with its cohorts'.

The Commission states that, at most, only approximately twenty (20) such cases fall within the foregoing tripartite classification identified by Orion.[9] Resolving those cases by way of comparative hearings, then, should pose no appreciable cost to the FCC. Such a course also

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[7] Orion Communications Limited v. FCC at 9.

[8] See Bechtel v. FCC, supra; Public Notice, 9 FCC Rcd. 6689 (Aug. 4, 1994).

[9] And that assumes that none of these twenty (20) cases will settle, a highly unlikely scenario
[Footnote Continued...]

would promote certainty, for a clear winner would finally emerge. And there would likely be no more delay, cost, or uncertainty that an auction method would engender. To be specific, in this case alone, if an auction method were employed and Orion were not the high bidder, it would challenge its competitors' proven inability to meet the Communications Act's character and integrity requirements.[10] In addition to the core unfairness, then, an auction would not promote any efficiency.

Administrative Feasibility

It would not be overly difficult for the Commission to develop comparative criteria to govern this small number of cases. Any suggestion to the contrary disserves the FCC's expertise and staff resources, resources which the former Commission inexplicably failed to utilize since 1993. Orion attaches as Exhibit 1, and incorporates by reference, a proposed set of concise comparative criteria which it commends to the Commission. Basically, these criteria envision that the pending applicants will brief the issues based on the existing hearing record. Nothing in these criteria should pose any inordinate difficulty for adjudication by a Commission seriously determined to ameliorate its predecessor's tardiness. Indeed, to the extent these proceedings might result in diversification in the pertinent markets, Orion suggests the public interest would be better served.

Nor are any of the proposed criteria of an ilk resembling those interdicted in Bechtel. None ask the Commission to take into account empirically unsound or illogical factors. Each suggested criterion is validly related and connected to the Communications Act's purposes. It is

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given the Commission's willingness to waive its rules.

[10] See Orion Communications Limited v. FCC at 8. (noting other applicants' adverse integrity findings).

perfectly logical, for example, to want to assess an applicant's broadcast experience or residence within the service area. In addition, of course, the Commission's existing duty to permit only persons or entities meeting its basic technical and its character and integrity requirements should be maintained.

To ameliorate any time constraints, it is suggested that the Commission impose tight scheduling periods for such cases. Applicants would initially be given twenty (20) and ten (10) days for filing Proposed Findings and Conclusions and Reply Findings and the Commission would be expected to reach a decision within forty (40) days, except for good cause found.[11]

Judicial Sustainability

Orion can understand the concerns expressed by certain Commissioners about under-representation of minorities and women in broadcast ownership. But it is likely that unless the FCC is willing to devote the time and resources necessary to analyze minority/female ownership and the reasons that might or might not impede their representation rate, any criteria giving preference at the outset to minority or gender status will risk judicial interposition.[12] Orion notes this, not because of any inherent antipathy towards such preferences, but rather out of pragmatic concerns. A policy that simply grants preferences based on unempirically validated findings would be inherently suspect. Unless the FCC can say with a degree of certainty that preferences will lead to better service, it should, with all due respect, stay out of this thicket at this time.

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[11] These are not unrealistic time constraints. What is unreasonable is for the FCC to use its predecessors' lethargy in handling comparative cases as grounds for transferring to an auction device. There is something intuitively unfair about an agency which cannot render rational licensing decisions on a timely basis and which then uses that inability as grounds for charging parties for those same licenses. Having created its dilemma, the Commission should not now be rewarded financially by taking in revenues from an auction method.

[12] E.g. Lamprecht v. FCC, 958 F.2d 382 (D.C.Cir. 1992)(invalidating gender preference).

Other Common Considerations

Whether the Commission utilizes comparative criteria or an auction method, Orion wishes to express its grave concerns with any method that allows a successful applicant to "flip" or otherwise resell a license. Orion submits that the Commission should expressly limit such rights, in a manner that requires the successful applicant to operate the station for at least three (3) years. If the Commission chooses an auction method, a successful bidder who attempts to sell or transfer ownership during that period for any reason other than the death of a controlling principal or bankruptcy should be forbidden from doing so. Parties should not be permitted or encouraged to buy their way out of non-compliance with the law. An agency which sets rules, but allows those violating its policies to profit from their violation as long as they share their ill-gotten gains with the government, only encourages public cynicism as well as overall non-respect for government and the rule of law.

In view of the foregoing, the Commission should adopt the comparative criteria discussed in its accompanying Exhibit 1 to be used solely in those pre-July 1, 1997 cases which have already been litigated with at least an initial decision rendered.

Respectfully submitted,

ORION COMMUNICATIONS LIMITED

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January 26, 1998

EXHIBIT 1

Part 73 of Title 47 of the Code of Federal Regulations should be amended to read as follows:

The provisions of this subsection shall apply to comparative broadcast proceedings involving applicants for new facilities that were designated for hearing by the Commission on or before July 1, 1994, where a decision has been rendered on an evidentiary record.

A. The comparative criteria shall consist of:

1. (a) Broadcast experience, (b) broadcast record, (c) local residence in the proposed service area and (d) civic activity in the service area, of parties in the applicant, proportionate to their equity interests (regardless of whether the equity is voting or nonvoting), without regard to their proposed role in management, minority status or gender.

2. Efficient use of frequency.

3. Diversification of control of the media of mass communications.

B. Hearing records regarding comparative issues will not be reopened for new evidence. The applicants may file proposed findings of fact and conclusions of law and reply findings on dates set by the Commission addressed to the existing hearing records under the six comparative criteria in A. The Commission shall render a decision based thereon with forty (40) days of the last filing date.